The sale of the lands in question within a very short space of time for the clear purpose of reinvestment must in the circumstances of this case take away any significance of multiple transactions.

It also seems to me that the experience which the Special Commissioners imputed to the appellant in rubber-holding was a different matter from experience in land-trading.

It will I think be well to bear in mind what Farwell L.J. said in *Hudson's Bay Co.* v. *Stevens*[4] at page 438.

"Land-owning is not a trade and it would be an enormous deterrent to that free dealing with land which the Common Law has for centuries regarded as of the greatest importance for the public weal, if the vendor were to be charged with income tax on all or any part of the purchase money of the land sold by him."

and what was said in the joint judgment of Rich, Dixon and Evatt JJ. in *Evans* v. *F. C. of T.*[5] at 99 cited in Commonwealth Taxation Board of Review No. 2 in 9 C.T.B.R. (N.S.) case 102:

"It is concerned with the well-known difference between enlargement of capital by sale of capital assets and obtaining detachable profit by buying and selling assets. The purpose for which it speaks is the *dominant purpose* actuating the acquisition of the assets — the use of which they are to be put."

In the circumstances of the facts as found by the Special Commissioners and drawing the reasonable inferences from them, at the very best, from the point of Revenue, the sale of the lands in 1966 for re-investment in the same kind of lands in the same year is an adventure in the nature of trade. But I am of the opinion, with respect, that the sale was a sale of capital assets and the difference an appreciation, which at law is not caught by tax.

The appeal is therefore allowed with costs.

Appeal allowed.

OOI AI SENG v. CHAN LIN LAM

[F.C. (Azmi L.P., Suffian & Ong Hock Sim F.JJ.)

April 1, 1973]

[Penang — Federal Court Civil Appeal No. 62 of 1972]

Landlord and Tenant — Tenancy agreement — Construction of wooden shed on land — Limited expenditure of money — Duration of tenancy — Equity — Equitable estoppel — Protection of tenant's occupation.

The plaintiff had entered into a tenancy agreement in December 1958 with the defendant's father. The agreement was that the plaintiff was to rent out a portion of his land for the tenant to construct a wooden shed. The defendant was recognised as the new tenant upon his father's death. In May 1966, the plaintiff issued a notice to the defendant to vacate the land within one month. When the defendant failed to do so the plaintiff brought the present suit. The defence was that the defendant had an equitable interest coupled with a tenancy or licence and hence he was entitled to stay as long as he liked. The plaintiff's claim was dismissed by the Sessions Court and the High Court and plaintiff appealed to the Federal Court.

Held, allowing the appeal: if there was anything at all suggesting the duration of the tenancy, the very nature of the construction of the wooden shed would indicate a tenancy of a temporary nature. It could not be said therefore that there had arisen an equity or equitable estoppel protecting the tenant's occupation of the land.

Cases referred to:-

(1) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129.

(2) *Devi* v. *Francis* [1969] 2 M.L.J. 169.

(3) *Plimmer* v. *Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App. Cas. 699.

(4) *Inwards* v. *Baker* [1965] 1 All E.R. 446.

(5) *Khew Ah Bah* v. *Hong Ah Mye* [1971] 2 M.L.J. 86.

(6) *Siew Soon Wah & Ors.* v. *Yong Thong Hong* [1973] 1 M.L.J.

(7) *In re King's Lease-hold Estates* (1873) L.R. 16 Eq. 521.

(8) *Kusel* v. *Watson* (1879) 11 Ch. D. 229.

FEDERAL COURT.

Lim Kean Chye and *A. Jayadeva* for the appellant.

Tan Seng Jin for the respondent.

Azmi L.P.: This is an appeal against the judgment of the High Court at Alor Star dismissing an appeal against the judgment of the Sessions Court. The facts may be briefly stated as follows: —

The plaintiff is the owner of a piece of land in Kedah. On 18th December 1958 he rented part of this land to one Chan Swee Kow and the terms of the tenancy are set out in a Chinese document obviously made by the parties themselves and its translation reads as follows: —

"This tenancy agreement is executed between Ooi Ai Seng (hereinafter referred to as landlord) and Chan Swee Kow (hereinafter referred to as tenant) on 18th December, 1958 both parties must strictly follow the terms as mentioned below:

(1) the landlord agrees to rent out a portion of his land in Tokai, Kedah (as shown in the plan) to the tenant.

(2) the tenant can only construct a wooden shed on the abovementioned land.

(3) the wooden shed constructed by the tenant must be near the house No. 136.

(4) the tenant must leave a space of 20 feet in width beside the house No. 130 for the road.

(5) the tenant must leave a space behind the shed for the back lane, the width shall be in accordance with the rules of Town Council. (In front of houses No. 132 and 134).

(6) the rental for the shed is $6 per month.

(7) the tenant must settle the rent at the beginning of every month."

Chan Swee Kow died in 1965 and his son the defendant in this suit, took over the tenancy and was recognised by the plaintiff as the new tenant. In May 1966, the plaintiff wishing to have the rented portion of the land in question for his own purpose issued a notice to the defendant to vacate the land within a month. The defendant failed to do so. On 23rd January 1972 the plaintiff brought the present suit in the Sessions Court for the removal of the shed and for delivery of vacant possession of the land in question. The defendant, however, contended that the notice to quit was bad in law and that he was entitled to the timber shed and to stay on the said land both on legal and equitable grounds and also that he would raise the

plea of estoppel. He further contended that the licence or tenancy granted to him had by being coupled with an interest in the land, become irrevocable.

From the evidence it would appear that the shed has been as agreed in the contract, used for the storing of timber. The shed had corrugated iron roof, wooden posts and wire mesh walls and according to the defendant he had not in any way altered the nature of the construction.

The learned President of the Sessions Court dismissed the claim on the ground that the plaintiff had no cause of action whatsoever. The plaintiff appealed to the High Court and the High Court dismissed the appeal.

In his judgment the learned judge referred to the following facts submitted by counsel for the defendant in support of his contention that there was in this case a tenancy coupled with an equitable interest: —

(i) that in pursuance of the written agreement Ex. P.1, appellant allowed the respondent's father to erect the shed on the said land,

(ii) that he has expended money in doing so,

(iii) that the shed was not demolished after the death of the respondent's father but the respondent was allowed to take over the tenancy which included the use of the shed on the same terms and conditions of the agreement in Ex. P.1.

(iv) that he has been paying the rents which have been accepted by the landlord.

The learned judge apparently accepted the above as sufficient evidence to give rise as he put it to — "one irresistible inference and one only, namely that the landlord had created an expectation in the former tenant, the defendant's father, that he would occupy the portion of the land marked out in the agreement for the purpose of erecting a shed ... (and) so long as he paid and continued to pay the rents and used the shed for the purpose for which the licence was given the landlord could not terminate the tenancy...."

Ramsden v. *Dyson*,[1] *Devi* v. *Francis*[2] *Plimmer* v. *Mayor, Councillors and Citizens of the City of Wellington*,[3] *Inwards* v. *Baker*,[4] *Khew Ah Bah* v. *Hong Ah Mye*[5] were cited at the hearing. In the Privy Council case of *Siew Soon Wah* alias *Siew Pooi Yoong & Others* v. *Yong Tong Hong (sued as a firm)*[6] the landlord rented the ground floor of his premises to the tenant on payment of a sum of $8,000. The monthly rent was $200. It was stated in the tenancy agreement that the tenancy shall be permanent. The Privy Council held that —

"the intention clearly was that the landlord should let the premises to the respondent for as long as the period as it was within his power to do so, that he should not be able to eject the respondent so long as he paid the stipulated rent and that the respondent should be entitled to occupy the property so long as he wished and so long as he paid the rent."

Their Lordships referred to *In re King's Leasehold Estates*[7] where the landlord had in writing let certain premises and had agreed not to raise the rent or to give notice to quit so long as the tenant paid the rent when due. It was also agreed verbally between them that the landlord should let the tenant remain in the premises for such term of years not exceeding the landlord's terms as the tenant might desire to be the tenant. Malins V.C. said that —

"... upon principle, I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays his rent, has a right to retain possession as long as the landlord's interest exists."

He went on to say that such a tenant's right to possession would be enforced in equity.

In *Kusel* v. *Watson*[8] a lessee of a house let it to Kusel at a fixed rent, agreed to let him have a lease at the same rent "at any period he may feel disposed" and further agreed not to molest or disturb him or raise his rent after Kusel had spent money improving the premises. Jessel M. R. (on appeal) in the course of the argument suggested that the agreement meant that the landlord was to grant a lease as long as he could and the Court of Appeal directed that he should be granted a lease for the residue of his landlord's terms, less one day, if he should so long live.

In both the above cases there was clear evidence upon which the court could hold that the landlord had agreed to let the tenant remain on the land for so long as the tenant would feel disposed to remain on it. It was not disputed that the landlord in each case had agreed that the tenancy or lease should be as long as the tenant might desire to be the tenant. The Privy Council also referred to *Inwards* v. *Baker* where a son had built a bungalow on his father's land and had lived in it thereafter in the expectation and belief that he would be allowed to remain there for his lifetime and for as long as he wished. The trustees of his father's will brought proceedings for the possession of the bungalow. Lord Denning M. R. at page 37 said this: —

"... in this case, even though there is no binding contract to grant any particular interests to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that the bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: 'You are to go. It is my land and my house.' Nor could he at any time thereafter so long as the son wanted it as his home."

Here again there are circumstances upon which the court could find that the father allowed an expectation to be created in the son's mind that the bungalow was to be his home for his life or at all events, his home as long as he wished it to remain as his home. In the circumstances, as Danckwerts L. J. put it: —

"... this is one of those cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

In *Plimmer's* case referred to by the learned trial judge in his judgment, their Lordships of the Privy Council pointed out that the transaction of 1856 — that is the extension of his jetty and the erection of a wharehouse made at the request and for the benefit of the Government whereby Plimmer had incurred much expenditure, — were sufficient to create in his mind a

reasonable expectation that his occupation is not to be disturbed. Their Lordships also stressed that nothing was done to limit the use of the jetty in point of duration and held that in consequence Plimmer had acquired an indefinite, that is practically a perpetual right to the jetty for the purpose of the original licence and if the ground was afterwards wanted for public purpose it could only be taken from him by the legislature.

On the other hand, in the instant case, it was provided in the contract that the tenant could only construct a wooden shed on the land and the shed they had in mind and subsequently built on the land was built of corrugated iron roof, wooden posts and wire mesh walls. If there was anything at all suggesting the duration of the tenancy, the very nature of the construction would indicate a tenancy of a temporary nature, and I am therefore unable to agree with the learned judge's conclusion that there had arisen in the tenant's favour an equity or equitable estoppel protecting his occupation of the land.

I would therefore allow the appeal and make an order in terms of the plaintiff's claim. The defendant must vacate the land within one month from the date of this judgment and he will pay the plaintiff's costs here and in the courts below. The plaintiff/appellant's deposit of $500 to be returned to him.

Suffian and **Ong Hock Sim F.JJ.** concurred.

Appeal allowed.

Solicitors: *Jayadeva & Zahir; Lim Huck Aik & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE

v. E.D.C.

[A.C.J. (Gill F.J.) April 10, 1973]

[Kuala Lumpur — Originating Motion No. 19 of 1972]

Income Tax — Double taxation — Person resident in Malaysia — Income derived from and subject to tax in Singapore — Tax for the year of assessment 1969 — Whether Singapore income liable to Malaysian tax — Double Taxation Agreements — Double Taxation Relief (Republic of Singapore) Order, 1966 — Repealed law — Double Taxation Relief (Singapore) Order, 1968 — Income Tax Act, 1967.

The question in this case was whether the respondent's income derived from Singapore in 1968 was liable to income tax for the year of assessment 1969. The Double Taxation Agreement 1966 between Malaysia and Singapore was effective until December 31, 1968 but it was no longer valid law in Malaysia as from January 1, 1968 by reason of the repeal of the Double Taxation Relief (Republic of Singapore) Order 1966 which had given it the force of law. The 1968 Double Taxation Agreement between Malaysia and Singapore came into force with effect from the year of assessment 1969. The Director-General of Inland Revenue, Malaysia took the view that the respondent was liable to Malaysian income tax for the year of assessment 1969 but on appeal the Special Commissioners decided that the respondent was exempt from Malaysian tax under the provisions of the Double Taxation Agreement of 1966. The Director-General of Inland Revenue appealed to the High Court.

Held: the exemption granted by the 1966 Order continued to be operative in the year 1968 as though such order was made under section 127 of the Income Tax Act, 1967 or under any other corresponding section. The 1966 Agreement also remained in force during the year 1968, even though the order giving it the force of law had been repealed. The exemption under the 1966 Agreement having been kept alive by the transitional and saving provisions contained in Schedule 9 to the Income Tax Act, 1967, until December 31, 1968, the respondent had acquired a benefit under the 1966 Agreement which by virtue of paragraph 2(b) of Article XXI of the 1968 Agreement was not affected, notwithstanding the provision in paragraph 1(a) of the same Article of the Agreement that it shall have effect as respects Malaysian tax for the year of assessment 1969.

CASE STATED.

Mohamad Nizar bin Idris (Federal Counsel) and *Rahmat bin Haji Jamari* (Federal Counsel) for the appellant.

J. Puthucheary for the respondent.

Gill F.J.: This is an appeal by way of case stated by the Special Commissioners of Income Tax under paragraph 34 of Schedule 5 to the Income Tax Act, 1967 at the instance of the Director-General of Inland Revenue.

The facts of the case as admitted or proved are simple. The respondent is a partner of Cooper Brothers & Co., a firm of chartered accountants practising in Malaysia, Singapore and Brunei. He also has shares in two companies resident in Singapore. In 1968 the respondent received from Singapore a sum of $49,408 as his share from the partnership and a sum of $2,090 being gross dividends from his shares in the two companies.

The respondent's income derived from Singapore was subject to tax in Singapore in accordance with the income tax laws of Singapore. The Comptroller of Income Tax, Singapore therefore took it into account in assessing the respondent's income tax for the year of assessment 1969.

As the financial year of the partnership ended on 31st May each year, the period 1st June, 1967 to 31st May, 1968 was the basis period for the year of assessment in relation to the respondent's share of the income from the partnership, under section 21(2) of the Income Tax Act, 1967. In relation to the gross dividends from his shares in the two companies the basis year for the year of assessment 1969, under section 20 of the Act, was the calendar year 1968.

The respondent was ordinarily resident in Malaysia during the basis year for the year of assessment in 1969 to which I have just referred.

The question for determination in this appeal is whether the respondent's said income received from Singapore is liable to Malaysian income tax. The Director-General of Inland Revenue, Malaysia answered that question in the affirmative and proceeded to levy tax accordingly. On appeal, the Special Commissioners of Income Tax decided that such income was exempt from Malaysian tax under the relevant exemption provisions of the agreement dated 16th August, 1966 (hereinafter referred to as the 1966 Agreement) which the Governments of Malaysia and the Republic of Singapore had entered into with a view to afford relief from double taxation in relation to Malaysian tax and Singapore tax.